Petition

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81-1656
No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CURLEE BOWERS,
Petitioner,

v.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Was the district court's order granting plaintiff's motion for voluntary dismissal of his cause of action on the condition that he refile his cause only within the State of Arkansas appealable because it was legally prejudicial to his ability to refile said action?

2. Was the condition imposed by the district court an abuse of discretion?

3. Did Petitioner acquiesce in the condition?

4. Did the district court's conditional order represent a serious interference with a substantial federally-created right of venue pursuant to the Federal Employers' Liability Act (FELA), 45 U.S.C. Sections 51-60?

5. Was the Petitioner denied a fair opportunity to be heard in each of the courts below on these issues?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit below is not reported. See Appendix, *infra,* page A-1.

JURISDICTION

On December 29, 1981, the Court of Appeals for the Eighth Circuit dismissed Petitioner's appeal from an order of the District Court for the Eastern District of Arkansas, Pine Bluff Division. A copy of said opinion, ordering the dismissal, is appended to this petition in the Appendix. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

STATUTES AND RULE INVOLVED

Relevant parts of Statutes and Rules cited herein:

"Rule 41. Dismissal of Actions

(a) Voluntary Dismissal: Effect Thereof.

* * *

(2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice."

Rule 41(a)(2) of *Federal Rules of Civil Procedure*

"§1404. Change of venue

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

Title 28 U.S.C., Section 1404(a)

"§56. Actions; limitations; concurrent jurisdiction of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of

the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States."

Title 45 U.S.C., Section 56

STATEMENT

Petitioner, Curlee Bowers, brought this cause of action under the Federal Employers' Liability Act (FELA), 45 U.S.C., Sections 51-60. Bowers is suing his employer, the St. Louis Southwestern Railway Company (the Cotton Belt Railroad) for back injuries he allegedly sustained as a result of the Railroad's negligence. This cause has not yet proceeded to trial.

Bowers ultimately was treated by an orthopedic surgeon in St. Louis, Missouri, beginning in 1980. To prosecute his FELA action, Bowers retained the law firm of Paul L. Pratt, P.C., which maintains offices in East Alton, Illinois, some twenty miles from St. Louis.

Petitioner's attorneys filed a three-count complaint against the Respondent with the District Court for the Southern District of Illinois on September 10, 1980. The Cotton Belt filed its answer September 25, 1980. Petitioner filed his reply on October 6, 1980.

On January 27, 1981, the Cotton Belt filed a motion to transfer the cause pursuant to 28 U.S.C., Section 1404, accompanying its motion with a brief. Bowers filed a motion to voluntarily dismiss his cause without prejudice on February 6, 1981. The Railroad filed on objection to the motion.

Petitioner filed an affidavit and motion in opposition to the transfer March 3, 1981. On March 23, 1981, the Honorable James Foreman, Chief Judge, ordered the cause to be transfer-

red to the District Court for the Eastern District of Arkansas, Pine Bluff Division. Judge Foreman found that the "balance of convenience is struck heavily in favor of defendant. There is simply no good reason for keeping the cause in the district where [sic] its relation to Arkansas is so uniformly substantial." (see App. p. A-7) The court left Bowers' motion to dismiss pending for consideration by the Arkansas court. At no time during these proceedings was Petitioner afforded a hearing on either the issue of transfer or the issue of dismissal.

Bowers renewed his motion for dismissal with the district court in Arkansas on April 27, 1981. Again, the Railroad filed an objection to the motion.

On July 7, 1981, the Honorable George Howard, Jr., granted Petitioner's motion for dismissal without prejudice on the condition that he must refile his action only within the State of Arkansas. The court found that "[a]n unconditional dismissal of the instant action would expose the defendant to the inconvenience that the transferring court attempted to avoid by granting defendant's motion for change of venue." (see App. p. A-10-11) Petitioner was again denied the opportunity of a hearing before the order was entered.

On July 27, 1981, Petitioner appealed the district court's order to the United States Court of Appeals for the Eighth Circuit. Petitioner filed both a brief and a reply brief in which he argued that his right to refile the action had been legally prejudiced by the condition and his substantial right to choose a forum had been denied. On December 29, 1981, a per curiam opinion by the court of appeals was filed dismissing Petitioner's appeal. That court found that the district court's conditional order did not "legally prejudice" the Petitioner in his ability to refile the suit. It also found that Petitioner had failed to oppose the condition in the district court. Thus, the court held the order was not appealable. Again, the Petitioner was not afforded an opportunity to be heard in oral argument. Furthermore, the

court of appeals wholly ignored Bowers' contentions regarding the importance of the FELA's venue provision.

EXISTENCE OF JURISDICTION BELOW

The District Court for the Southern District of Illinois had jurisdiction over this cause of action under 45 U.S.C. Sections 51-60 and the District Court for the Eastern District of Arkansas had jurisdiction under the foregoing statute and under 28 U.S.C. Section 1404(a).

ARGUMENT

The decision below should be reviewed by this Court because in effect it denies Petitioner his federally-created right to choose his forum in accordance with 28 U.S.C. Section 56, the venue provision of the FELA. The court below has rendered an opinion which involves a novel question concerning a federal cause of action which should be resolved by this Court. Because this Court has held that the FELA's venue provision involves a "substantial right" and because this appeal presents novel questions concerning the provision's applicability, the Court should grant this review.

1. The district court's order, which is the basis of this petition, is appealable, contrary to the opinion of the court of appeals. That order granted Plaintiff's motion for voluntary dismissal of his cause of action but only on the condition that he refile in a court within the State of Arkansas.

Although a voluntary dismissal order qualifies as a final judgment for the purpose of appealability, generally a plaintiff cannot appeal from such an order. At least one circuit, however, has recognized an exception in the case of a conditional dismissal. *LeCompte* v. *Mr. Chip, Inc.*, 528 F.2d 601, 603-04 (5th Cir. 1976). In that case, the court held that such an order is appealable if: (1) the plaintiff is legally prejudiced by the attached condition, and (2) the plaintiff did not acquiesce in the prejudicial condition.

The court below, in a terse, two-page opinion, erroneously found that Bowers failed to meet either criterion. It held that even though the condition somewhat restricted Petitioner's right to refile his cause, it did not " 'severely circumscribe' his ability to actually reinstate the suit." Furthermore, it concluded that "the record discloses no opposition to the condition by Bowers in the district court." (see App. p. A-2-3)

The court below simply ignored the determinative fact that Bowers did not bring a common law tort action but rather brought a cause of action created by federal statute. The district court's order severely circumscribed Bowers in his ability to refile his cause of action in any number of jurisdictions available to him pursuant to the FELA's venue provision. The Fifth Circuit characterizes "legal prejudice" as a condition which circumscribes a plaintiff in his ability to refile his cause without interference.

The FELA provides the injured railroad employee with a statutory cause of action against his negligent employer. This Court has repeatedly held that the Act is to be construed liberally in favor of the injured employee. *Coray* v. *Southern Pacific Railway Company,* 335 U.S. 520 (1949). Furthermore, Congress purposefully provided the employee with a wide range of available forums in which to bring his action. Under Section 56 he is not restricted to filing suit at the railroad's place of residence. Nor must he file in the forum where the accident occurred. Rather, the plaintiff is free to bring his action in any jurisdiction where the railroad is doing business. Congress's motive behind this legislation was to prevent the injustices which had employees suffered as a result of the more limited general venue provisions. *Baltimore & Ohio Railroad Company* v. *Kepner,* 314 U.S. 44, 54 (1941). Congress has resisted all attempts aimed at limiting this far-ranging venue provision.

The Court characterizes this right of the plaintiff to choose his forum as a "substantial right". *Boyd* v. *Grand Trunk Western Railway Company,* 338 U.S. 263 (1949). This Court has further held that a plaintiff's choice of forum is of such importance that it should rarely be disturbed. *Gulf Oil Corporation* v. *Gilbert,* 330 U.S. 501 (1947).

Curlee Bowers is being judicially stripped of his statutory right to bring his suit in Texas or Missouri or Illinois. Yet, in face of the above, the court of appeals below concluded that re-

quiring him to refile in Arkansas was not legally prejudicial to his interests. It seems obvious that by denying Bowers his access to other forums, the condition amounted to legal prejudice. Bowers submits that this condition is " 'legal prejudice' which goes to the heart of Plaintiff's legal cause of action as entitling Plaintiff to appeal the conditional dismissal of his action. *LeCompte* v. *Mr. Chip, Inc.*, 528 F.2d 601, 604 (5th Cir. 1976).

2. The attached condition represents a flagrant abuse of judicial discretion by the district court. Clearly, a district court is empowered to attach reasonable conditions when granting a voluntary dismissal pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure. However, the key word is reasonable.

In *LeCompte* v. *Mr. Chip, Inc., supra,* the Fifth Circuit examined the conditions normally imposed by Rule 41 dismissals. It concluded that the conditions contemplated by Rule 41(a)(2) "do not create prejudice in a legal sense to the bringing of another suit. Rather, the usual conditions attached to a voluntary dismissal involve prejudice only in a practical sense (e.g. paying costs or expenses, producing documents, producing witnesses." *supra,* at 603.

In *LeCompte,* the plaintiff had been required to refile with the district court granting the dismissal.

Clearly, the district court abused its discretion by attaching a condition which flagrantly prejudiced Bowers in his ability to pursue his cause of action in the forum of his choice. As in *LeCompte,* the condition imposed by the district court below is not the type usually encountered in Rule 41(a)(2) dismissal orders. Nothing indicates that the drafters of the rule contemplated its use as a vehicle for the arbitrary restriction of a plaintiff's exercise of his federally-created rights.

3. Curlee Bowers did not acquiesce in the prejudicial condition in the district court's order. The order was entered on July 7, 1981, and Bowers began the appeals process which ultimately

lead to this petition on July 27, 1981. The opinion below baldly states that Bowers did not oppose the condition in the district court. However, the opinion fails to note the fact that no hearing was set in which Petitioner could make his objections before the order was entered. Nor do the Fifth Circuit cases which recognize the conditional order exception hold that an objection must be made in the district court before an appeal can lie. See *Yoffe* v. *Keller Industries, Inc.*, 580 F.2d 126, rehearing denied 582 F.2d 982 (5th Cir. 1978), *cert. den.* 440 U.S. 915 (1979).

4. The district court's condition requiring Curlee Bowers to refile his action only within the State of Arkansas is not only legally prejudicial to his interests, it is an unreasonable interference with a substantial federally-created right.

As has been stated, Bowers brought his original action pursuant to the FELA. When the motion to transfer was first made, he sought to voluntarily dismiss the action in order to refile in another jurisdiction. Section 56 of the FELA is both a jurisdiction and a venue statute for the federal court system and a jurisdiction statute for state court systems. The actual venue of the state courts was left to the practices of the individual forums. *Miles* v. *Illinois Central Railroad Company*, 315 U.S. 698 (1942).

By the statute's express language, Curlee Bowers is empowered by federal law to bring his action in *any* of the following forums:

1. In the district of the residence of the defendant;
2. In the district in which the cause of action arose;
3. In any district in which the defendant is doing business;
4. In state courts meeting the above-stated jurisdictional requirements.

By its conditional order, the district court has arbitrarily and unreasonably denied Petitioner his federally-created right of access to the federal and state courts of a great many southern and western states. For instance, the Respondent Railroad has general offices in St. Louis, Missouri; San Francisco, California; Houston and Tyler, Texas. Respondent's very nickname, "The Cotton Belt," certain suggests the variety of jurisdictions where it can be found doing business. Although it would take a detailed study to determine all of the potential forums available to Petitioner, that figure obviously is many times the number of courts available in Arkansas.

Furthermore, it is well-established that a corporate defendant doing business in a number of states must reasonably except the possibility of suits in many forums. Such defendants, the courts reason, are better able than a plaintiff to bear the attendant expense and possible inconvenience of a trial in a place not of its choosing. *Schonbuch* v. *Lee Fleet Management, Inc.*, 203 F.Supp. 793 (S.D.N.Y. 1961).

By its action, the district court below has judicially overriden the clear and express language of the statute by prohibiting Petitioner from filing suit in *any* of the authorized places of jurisdiction and venue *except* in the state where the cause of action arose. There simply is no authority for such an arbitrary and unreasonable limitation.

Congress enacted the FELA's venue provision in 1910. Prior to that time, an injured worker was required to bring his FELA claim only at the railroad's place of residence. Clearly, Congress intended to benefit the injured worker by allowing him to bring his action in the forum to be most advantageous to his interests. *Petersen* v. *Ogden Union Railway & Depot Co.*, 175 P.2d 744, 747 (Utah 1946). Furthermore, Congress has resisted all attempts aimed at limiting the venue provision, thus reaffirming its resolve to protect a Plaintiff's substantial right to choose his forum.

This Court has repeatedly recognized in numerous decisions the Congressional policy underlying the FELA. As the Court noted in *Baltimore & Ohio Railroad Co.* v. *Kepner,* 314 U.S. 44, 53 (1941): "The [venue] privilege was granted because the general venue provisions worked injustices to the employee." The Court went on to say at 54:

> A privilege of venue granted by the legislative body which created this right of action cannot be frustrated for reasons of convenience or expense.

Obviously, this Court recognizes the FELA's liberal venue provision to be a privilege created by federal statute for the protection of the injured railroad worker. It is a privilege which should not be denied in such a cavalier manner.

By denying the appealability of this conditional order, the court of appeals below has done exactly that which this Court has admonished against—it has frustrated Curlee Bowers' federally-created privilege of venue because of the alleged inconvenience and expense Respondent Railroad will suffer.

This Court has held that a plaintiff's right to choose his forum without interference, pursuant to Section 56, is not merely a "right" but a "substantial right." *Boyd* v. *Grand Trunk Western Railway,* 338 U.S. 263 (1949). This Court has further held that a plaintiff's exercise of this substantial right should rarely be disturbed except in extreme circumstances. *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501 (1947). Yet, by dismissing Bowers' appeal, the Eighth Circuit has choosen to ignore the clear mandate of this Court and in doing so has severely prejudiced his right to file this cause.

Furthermore, it is irrelevant that this cause was transferred from an Illinois federal court to an Arkansas federal court pursuant to 28 U.S.C. Section 1404(a). The 1404(a) transfer absolutely has no impact upon the state courts empowered to hear

this cause. As this Court noted in *Pope* v. *Atlantic Coast Line Railroad Co.*, 345 U.S. 379 (1953):

> Section 1404(a), by its very terms, speaks to federal courts; it addresses itself only to that federal forum in which a lawsuit has been initiated; its function is to vest such a federal forum with the power to transfer a transitory cause of action to a more convenient federal court. *It does not speak to state courts,* and it says nothing concerning the power of some court other than the forum where a lawsuit if initiated to enjoin the litigant form further prosecuting a transitory cause of action in some other jurisdiction.

Obviously, Judge Foreman's decision to transfer in no way limits a state court in its ability to hear this cause of action. Judge Foreman only addressed factors which he considered important to venue in *his* courtroom. He cannot and did not speak for other courts, state or federal. His decision obviously is not binding on any state court and his order cannot prevent a state judge in Missouri or Texas or even Illinois from hearing Bowers' cause, if the Section 56 venue requirements are met. Whether to dismiss an action based on forum non conveniens depends on a variety of factors which are addressed to the sound discretion of the court considering the issue. The district court below does not have the power to impose its determination of what essentially is the forum non conveniens question on any other jurisdiction. Furthermore, Section 1404(a) does not merely codify the ancient common law doctrine of forum non conveniens. It is more formalistic and less exact than the common law doctrine. *Norwood* v. *Kirkpatrick,* 349 U.S. 29 (1955). In deciding whether to invoke forum non conveniens, a state court looks at a number of factors significantly different from those a federal court considers. Therefore, Judge Foreman based his decision to transfer this cause to Arkansas upon a more limited number of considerations than a state court judge

would follow in addressing the issue. Clearly, Section 1404(a) does not address itself to the broad issues suggested by the forum non conveniens question. Therefore, Judge Howard's interest in protecting the sanctity of Judge Foreman's transfer order should be disregarded.

Obviously the federal courts do not have exclusive jurisdiction over FELA actions. Section 56 states: "The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the several states." In connection with the right to bring suit in state court, this stated:

> Since the existence of the cause of action and the privilege of vindicating rights under the FELA in state courts spring from federal law, the right to sue in state courts of proper venue where their jurisdiction is adequate is of the same quality as the right to sue in federal courts. It is no more subject to interference by state action than was the federal.
>
> *Miles* v. *Illinois Central Railroad Co.*, 315 U.S. 698, 62 S.Ct. 827, 830 (1942).

Since a state court cannot prevent a plaintiff from filing suit in a federal court or in another state's court, this same restriction applies to a federal court since Congress did not delegate second-class FELA jurisdiction to the state courts. Nothing in the statute suggests that a federal court is imbued with anymore inherent power than a state court when considering a claim brought under the FELA. The statutory language is both clear and mandatory — jurisdiction is concurrent and equal.

Obviously, the district court's action amounts to an unwarranted and unreasonable interference with the plaintiff's "substantial right" to select his forum. Furthermore, by dismissing Petitioner's appeal, the court of appeals has approved this arbitrary action. Bowers did not choose to bring his FELA action in any court sitting in the State of Arkansas. He was fully

aware that the Arkansas courts, both federal and state, were available to him, but he rejected that jurisdiction pursuant to his rights under Section 56. Bowers chose to be represented by a law firm from the state of Illinois which has specialized for more than a decade in FELA litigation. He selected the law firm not only because of its expertise but also because of its ability to file his action in a forum of his choice. He originally filed suit in a federal court sitting in Illinois. Because Bowers purposefully did not file in Arkansas, he sought leave to voluntarily dismiss his cause without prejudice after the transfer motion was filed. He now seeks to refile his cause of action in another jurisdiction pursuant to the mandate of the FELA venue provisions. Curlee Bowers is seeking to exercise a right which has repeatedly been recognized by this Court as substantial and which Congress has granted and reaffirmed. The Congressional policy underlying the venue provision is clear and compelling — to allow the injured railroad employee to bring his suit in the most advantageous forum. Obviously, the district court below has no right to interfere with or frustrate Curlee Bowers' exercise of this right. In doing so, it has chosen to ignore the mandate of this Court and the intent of Congress.

5. Finally, Petitioner strongly urges that he has been denied his right to be heard in this matter. At no point in any of the proceedings leading to this petition has Bowers been granted the opportunity to be heard in oral argument. The cause was transferred from Illinois to Arkansas without a hearing. The cause was dismissed upon the conditional order by the district court in Arkansas without a hearing. Petitioner's appeal was dismissed by the court of appeals in a terse two-page opinion without oral argument.

Because of the importance this Court obviously attaches to a plaintiff's right to select a forum, Petitioner believes that it is essential that he be heard in oral argument. It rests solely with this Court to remedy this situation.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1810

Curlee Bowers,
Appellant,

v.

St. Louis Southwestern Railway Company,
a corporation,
Appellee.

Appeal from the United States District Court
for the Eastern District of Arkansas.

Submitted: December 22, 1981

Filed: December 29, 1981

Before HEANEY, HENLEY and McMILLIAN, Circuit Judges.

PER CURIAM.

Plaintiff-appellant Curlee Bowers appeals from an order of the district court[1] conditioning the voluntary dismissal of his action upon the requirement that the suit, if refiled, be commenced in either the state or federal courts of Arkansas. *See* Fed. R. Civ. P. 41(a)(2). We dismiss the appeal.

As a general rule, no appeal by the moving plaintiff will lie from an order granting a voluntary dismissal. *E.g., Management Investors* v. *United Mine Workers,* 610 F.2d 384, 393 (6th Cir. 1979); *Yoffe* v. *Keller Industries, Inc.,* 580 F.2d 126, 129 (5th Cir. 1978), *cert. denied,* 440 U.S. 915 (1979). *See generally 5 J. Moore Federal Practice* ¶ 41.05[3] (2d ed. 1975). In the case of conditional voluntary dismissal orders, however, an exception has been recognized where the plaintiff is legally prejudiced by the conditions accompanying the grant of dismissal and no acquiescence in those conditions has been evidenced on his part. *LeCompte* v. *Mr. Chip, Inc.,* 528 F.2d 601, 603-04 (5th Cir. 1976); *see Yoffe* v. *Keller Industries, Inc., supra,* 580 F.2d at 130. Even assuming this exception to the general rule to be applicable in this circuit, Bowers has failed to satisfy the two prerequisites to appealability. The condition appended to the dismissal order did not "legally prejudice" Bowers; although restricting to a certain degree his right to refile this action, it does not "severely circumscribe" his ability to actually reinitiate the suit. *Compare LeCompte* v. *Mr. Chip, Inc., supra,* 528 F.2d at 603-05; *Yoffe* v. *Keller Industries, Inc.,* 580 F.2d at 130-31. *Cf. Scholl* v. *Felmont Oil Corp.,* 327 F.2d 697, 700 (6th Cir. 1964) (dismissal conditioned in part upon requirement that suit, if refiled, be refiled in same court was not "unreasonable"). Moreover, the record discloses no opposition to the condition

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[1] The Honorable George Howard, Jr., United States District Judge for the Eastern and Western Districts of Arkansas.

by Bowers in the district court. *Compare Yoffe, supra,* 580 F.2d at 130; *LeCompte, supra,* 528 F.2d at 604. In these particular circumstances, we conclude that the order of dismissal is not appealable by Bowers. Accordingly, the appeal is dismissed. *See* 8th Cir. R. 12.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF ILLINOIS

Curlee Bowers,
Plaintiff,

v.

St. Louis Southwestern Railway Company,
a corporation,
Defendant.

ORDER

FOREMAN, Chief Judge:

Before the Court in this F.E.L.A. action is defendant's Motion to Transfer (Venue) under 28 U.S.C. §1404(a), filed January 27, 1981, plaintiff's Motion for Voluntary Dismissal, filed February 6, 1981, defendant's Objections to Plaintiff's Motion for Voluntary Dismissal, filed February 27, 1981, plaintiff's objections to defendant's Motion to Transfer Venue, filed March 3, 1981 and briefs accompanying these motions. For the reasons given below, defendant's Motion to Transfer Venue is hereby GRANTED, and plaintiff's Motion for Voluntary Dismissal will not be ruled on at this time.

Plaintiff filed this case on September 10, 1980, under the Federal Employers' Liability Act, seeking relief for injuries sustained while working in defendant's employ in Pine Bluff, Arkansas. Defendant asserts that the case should be transferred to the United States District Court for the Eastern District of Arkansas, at Pine Bluff, Arkansas, pursuant to 28 U.S.C. §1404(a), since all injuries occurred in Arkansas, all witnesses reside in Arkansas and none reside in Illinois, the State of Illinois has no interest in the cause, and that the presence of ex-

pert witnesses in the jurisdiction of the transferor court has absolutely no bearing on the decision in the present case. Defendant also filed a supplementary brief in support on February 27, 1980, to which it attached an affidavit setting forth the names of witnesses it expects to call at trial and stating that each of the seven reside in Arkansas.

Plaintiff, in opposition, argues that defendant waited four months after commencement of the suit, during which time discovery was had, before filing its motion, that the plaintiff in an F.E.L.A. case has a "substantial right" to select a forum, that plaintiff's attorneys and expert witnesses reside in this district, and that the distance of three hundred fifty (350) air miles from Pine Bluff to the place of trial is rendered insubstantial by the availability of modern transportation. In addition, plaintiff argues that defendant has failed to indicate the names of potential witnesses and the nature of their expected testimony. However, this charge is made false by defendant's affidavit of February 26, 1981.

The transfer of venue sought in this case is governed by 28 U.S.C. §1404(a). That statute provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

This provision is not merely a codification of the common law doctrine of forum non conveniens. Rather, it embodies a more lenient standard which requires a lesser showing of inconvenience than was required at common law. *Coats Co., Inc.* v. *Vulcan Equipment Co., Inc.*, 459 F.Supp. 654 (N.D. Ill. 1978); *Norwood* v. *Kirkpatrick*, 349 U.S. 29 (1955). Moreover, while plaintiff's choice of forum is considered to be of substantial importance, it is no longer the dominant factor as it was under the doctrine of forum non conveniens, *Garner* v. *Wolfin-*

barger, 433 F.2d 117 (5th Cir. 1970); *SEC* v. *First National Fin. Corp.,* 392 F.Supp. 239 (N.D. Ill. 1975) and courts have held that where all the operative facts occurred elsewhere, the plaintiff's choice is given less weight. *Leinberger* v. *Webster,* 66 F.R.D. 28 (E.D. N.Y. 1975); *see also, Wright & Miller, Federal Practice and Procedure: Civil* §3848 at 243 (1976).

Other factors include the convenience of the parties, convenience of witnesses and the interests of justice. *See, Gulf Oil Corporation* v. *Gilbert,* 330 U.S. 501 (1947). Considering all the factors in the present case, it is clear that the venue transfer should be granted. First, as stated above, the plaintiff's choice of forum deserves substantial consideration, but it must be viewed in light of the fact that all the operative facts of the case occurred in Arkansas. Second, according to the uncontroverted affidavit of defendant, all the witnesses it intends to call reside in Arkansas nearly four hundred miles from this Court. Thus, there would be substantial inconvenience and expense involved with bringing those individuals from Arkansas to testify. *See, Pacific Car & Foundry Co.* v. *Pence,* 403 F.2d 949 (9th Cir. 1968). Moreover, a transfer would not be expected to cause great prejudice to plaintiff, who apparently is a resident of Arkansas.

The factors asserted by plaintiff as dispositive are unpersuasive. The convenience or location of counsel is a factor of minimal or no importance. *Sypert* v. *Miner,* 266 F.2d 196 (7th Cir.), *cert. denied,* 361 U.S. 832 (1959); *Burroughs Corp.* v. *Newark Electronics Corp.,* 317 F.Supp. 191 (N.D. Ill. 1970). In addition, the location of plaintiff's expert witnesses, such as his medical specialist in St. Louis, is similarly entitled to minimal consideration. *McCrystal* v. *Barnwell County,* 422 F.Supp. 219 (S.D. N.Y. 1976); *Helfant* v. *Louisiana & Southern Life Ins. Co.,* 82 F.R.D. 53 (E.D. N.Y. 1979). At any rate, the inconvenience caused to one medical specialist is outweighed by the inconvenience accruing to the individuals from Arkansas.

The balance of convenience is struck heavily in favor of defendant. There is simply no good reason for keeping the case in the district where its relation to Arkansas is so uniformly substantial. As Judge Kaufman stated in *Observation On Transfers Under Section 1404(a) of the New Judicial Code,* 10 F.R.D. 595, 606-7 (1950), and as pointed out by defendant:

> Locality in which the cause of action arose is a varying factor. The Supreme Court in *Gulf Oil Corp.* v. *Gilbert,* said that jury duty is a burden that should not be imposed on the community which has no relation to the litigation. This is most apparent in actions for personal injury or death usually arising under the Federal Employers' Liability Act, wherein the locale to which it is sought to transfer the action is that in which the injury occurred, and where the parties and witnesses are to be found. This is a relatively simple case, and transfer is always ordered where no extenuating circumstances are involved.

Accordingly, defendant's Motion to Transfer Venue is hereby GRANTED.

Turning to plaintiff's Motion for Voluntary Dismissal, Rule 41(a)(2) of the Federal Rules of Civil Procedure provides:

> [A]n action shall not be dismissed at plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper.

Since the Court has decided that the case should be transferred to the Eastern District of Arkansas, the Court declines to rule on the motion at this time but instead leaves it pending for disposition by the transferee court.

The Clerk is ORDERED to close this file and transfer the case to the United States District Court for the Eastern District of Arkansas, Pine Bluff Division.

IT IS SO ORDERED.

DATED: March 23, 1981.

/s/ James L. Foreman
CHIEF JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

NO. PB-C-81-71

Curlee Bowers,
Plaintiff,

v.

St. Louis Southwestern Railway Company,
Defendant.

ORDER

Plaintiff instituted this case originally on September 10, 1980, in the United States District Court for the Southern District of Illinois, under the Federal Employer's Liability Act, seeking relief for injuries sustained while working in defendant's employ in Pine Bluff, Arkansas.

Pursuant to defendant's request, the case was transferred to the United States District Court for the Eastern District of Arkansas, Pine Bluff Division, on March 25, 1981, pursuant to 28 U.S.C. §1404(a):

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

All witnesses to the incident resulting in plaintiff's injuries reside in Arkansas.

On April 27, 1981, plaintiff moved for voluntary dismissal of this lawsuit stating, in part, that plaintiff "desires to voluntarily dismiss his lawsuit and refile his lawsuit in another jurisdiction and venue, pursuant to provisions of Title 45 U.S.C.A. §56." Defendant filed its motion in opposition for voluntary dismissal on May 19, 1981, contending, among other things:

> 3. Defendant objects to plaintiff's motion to dismiss. To allow plaintiff to dismiss would allow plaintiff to circumvent Judge Foreman's order of transfer and cause defendant the same inconvenience of an Illinois forum as stated in Judge Foreman's order.
>
> 4. Should this Court allow a dismissal, defendant requests that this Court, under Rule 41(a)(2), provide as a part of the order that should plaintiff desire to refile his case, he be required to do so either in the federal or state courts of Arkansas, and he not be permitted to refile in the state courts of Illinois.

Rule 41(a)(2) of Fed. Rules of Civ. Proc. provides:

> "[A]n action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper . . . ."

A plaintiff's request for dismissal under Rule 41(a)(2) is within the sound discretion of the Court. *Stevenson* v. *Missouri Pacific Railroad Company,* 53 F.R.D. 184 (E.D. Ark. 1971). While orders granting a request for voluntary dismissal usually require payment of costs and attorney's fees as a condition for dismissal, the dismissal may be conditioned upon the imposition of other terms designed to reduce inconvenience to the defendant. *LeCompte* v. *Mr. Chip, Inc., et al.,* 528 F. 2d 601 (5th Cir. 1976).

An unconditional dismissal of the instant action would expose the defendant to the inconvenience that the transferring

court attempted to avoid by granting defendant's motion for a change of venue.[1] Consequently, the Court is persuaded that plaintiff's request for a voluntary dismissal without prejudice should be granted on the condition that in the event the plaintiff desires to refile his action, the plaintiff shall be required to do so either in federal or state courts of Arkansas.

IT IS SO ORDERED this 1st day of July, 1981.

/s/ George Howard, Jr.
UNITED STATES DISTRICT JUDGE

---

[1] On March 23, 1981, The Honorable James L. Foreman, Chief Judge, United States District Court for the Southern District of Illinois, entered an order transferring the above-captioned matter to this Court pursuant to defendant's motion for change of venue, but left for this Court to act upon plaintiff's motion, pending at the time, for a voluntary dismissal.

Opposition

Supreme Court, U.S.
FILED
APR 5 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1656

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CURLEE BOWERS,
Petitioner,
v.
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
Respondent.

OPPOSITION RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Attorney for Respondent

QUESTIONS PRESENTED

1. The opinion of the Court of Appeals recognized that the order of the District Court was appealable had petitioner met two prerequisites.

2. The District Court's order granting petitioner's motion for a voluntary dismissal of his claim on the condition that, if he refiles, he must in state or federal courts in Arkansas, was within the sound discretion of the District Court, and no abuse occurred.

3. Petitioner did acquiesce in the condition set by the District Judge in his order of voluntary dismissal.

4. The District Court's order is not an unreasonable interference with a substantially federally-created right.

5. Petitioner has not been denied his right to be heard in this matter; if anything, he has forfeited his right to be heard.

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ARGUMENT

Petitioner has failed to suggest "special and important reasons" for this case to be accepted for review by the Supreme Court.

Petitioner asserts that because the voluntary dismissal order including a condition upon refiling involved a claim under the Federal Employers' Liability Act, the petitioner has been so prejudiced and his so-called "rights" so substantial that the case should be re-examined by this Court. This is not the correct standard.

This Court in the case of *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955) stated at page 74:

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. (Cases cited.) "Special and important reasons" imply a reach to a problem beyond the academic and the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the court's duty to avoid decision of constitutional issues unless avoidance becomes evasion.

Simply because the case involves a claim under FELA does not justify granting certiorari. *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 559 (1957).

Petitioner does assert that the opinion of the Court of Appeals for the Eighth Circuit involves a novel question, but respondent disagrees. The key issues involved are ones of procedure: transferability of a case from one district to another and a voluntary dismissal including terms and conditions within the discretion of a district court. There is no conflict among the circuits on these questions; indeed, the opinion of the Court of Appeals in this case is consistent with the opinions of other circuits.

1. The opinion of the Court of Appeals recognized that the order of the district court was appealable had petitioner met two prerequisites. He did not, and the appeal was properly dismissed.

Both parties cited and relied upon the cases of *LeCompte*

v. Mr. Chip, Inc., 528 F.2d 601 (5th Cir. 1976) and *Yoffe v. Keller Industries, Inc.*, 580 F.2d 126 (5th Cir. 1978), but the Court of Appeals interpreted those cases in the same manner as respondent does. Now petitioner attempts to escape those two cases simply on the basis that his case is an FELA claim. FELA claims are subject to transfer under 28 U.S.C. § 1404(a) and to discretionary conditions under F.R.Civ.P., Rule 41(a)(2).

2. The District Court's order granting petitioner's motion for a voluntary dismissal of his claim on the condition that, if he refiled, he must in state or federal courts in Arkansas, was within the sound discretion of the District Court, and no abuse occurred.

The United States District Judge in the Southern District of Illinois, the forum in which the case was originally filed, carefully considered the nature of FELA, its venue provisions, and other factors before deciding that the case should be transferred to United States District Court in Arkansas. Petitioner sought to circumvent that ruling by filing his motion for voluntary dismissal, but the United States District Judge in Arkansas sought to uphold the order of transfer, but at the same time fairly allowing petitioner a wider selection of forum than just the Pine Bluff Division of the Eastern District of Arkansas. This can hardly be considered an abuse of discretion, and certainly not, as characterized by petitioner, a "flagrant" abuse of discretion.

It hardly seems proper for this Court to accept for a review case of whether or not a district judge has abused his discretion. The Supreme Court has consistently confined its review to "cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties . . ." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 79 (1955).

3. Petitioner did acquiesce in the condition set by the District Judge in his order of voluntary dismissal. Petitioner did not acquaint the District Judge with sufficient background of his position, merely that he voluntarily wanted a dismissal without prejudice. Then when respondent objected unless conditions were imposed, petitioner still did not acquaint the court with his full position. Even after the order was entered, petitioner did not object, did not ask for reconsideration, and did not ask the District Judge to modify his order.

Petitioner should have done as the plaintiff did in *LeCompte v. Mr. Chip, Inc., supra,* when the plaintiff moved to amend or reform the original order of the district judge. Or petitioner should have done as the plaintiff did in *Yoffe v. Keller Industries, Inc., supra,* who made "numerous, vociferous objections" to the methods by which attorneys' fees were proved in that action, those attorneys' fees being the condition imposed in the voluntary dismissal order.

Petitioner took neither formal nor informal steps to object to the terms attached to the District Court order. This was pointed out to the Court of Appeals for the Eighth Circuit, and that court ruled that petitioner had acquiesced. This reason stated in the petition for the writ of certiorari certainly does not meet the standards of the United States Supreme Court for accepting review.

4. The district court's order is not an unreasonable interference with a substantially federally-created right.

For the most part petitioner cites cases which were decided prior to the effective enactment of 28 U.S.C. § 1404(a), the transfer provision under which the Illinois district judge transferred the case to the Arkansas district court. See *Miles v. Illinois Central Railroad Co.*, 315 U.S. 698

(1942); *Petersen v. Ogden Union Railway & Depot Co.*, 175 P.2d 744 (Utah 1946); *Baltimore & Ohio Railroad Co. v. Kepner*, 314 U.S. 44 (1941).

The transfer provision does "interfere" with the "absolute" nature of the venue provision in Section 56 of FELA. Congress certainly did intend for federal courts to look to the convenience of the parties and witnesses and to the interest of justice, and thereby did limit plaintiffs in FELA cases.

The venue provision of FELA surely must be read in light of the transfer provision of Section 1404(a) and the judicial discretion called for in F.R.Civ.P., Rule 41(a)(2).

5. Petitioner has not been denied his right to be heard in this matter; if anything, he has forfeited his right to be heard. At no point did petitioner make known to the District Judge his desire for a hearing on his motion or upon respondent's objection, nor did he request any reconsideration or modification of the order containing the condition.

CONCLUSION

Respondent respectfully urges this Court to deny the petition for writ of certiorari.

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